Omni Innovations LLC et al v. Inviva Inc et al Doc. 15

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; JAMES S. GORDON, JR., a married individual, Plaintiffs, v. INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Insurance Co. Of New York; and JOHN DOES, I-X, Defendants.	NO. 06-cv-01537-JCC **DEFENDANT'S MOTION TO STAY THIS LITIGATION** NOTE ON MOTION CALENDAR: May 4, 2007

I. INTRODUCTION

Defendant Inviva, Inc. ("Inviva") hereby moves to stay this lawsuit pending resolution of another lawsuit brought by Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni") alleging precisely the same claims before this Court – Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Gordon"). Gordon is scheduled for trial on June 18, 2007. The complaints and causes of action alleged by Plaintiffs are virtually identical in each case. In Gordon, there are cross-motions for summary judgment which may result in a dispositive issue preclusion/collateral estoppel effect on this case. Plaintiffs seek only statutory damages

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and are, therefore, not suffering irreparable harm from the emails in question. In contrast, without a stay of proceedings in this case, the Court's resources are likely to be wasted and the parties will incur unnecessary legal fees and costs. Indeed, in two other cases involving Gordon and Omni, this Court has already ordered stays pending resolution of Gordon. *See* Omni Innovations, LLC v. SmartBargains.com, LP, Case No. CV06-01129-JCC, W.D.Wash. (Coughenour, J.) ("SmartBargains") (Dkt. # 17), Omni Innovations, LLC et al. v. Ascentive, LLC et al., Case No. CV06-01284-TSZ, W.D.Wash. (Zilly, J.) ("Ascentive") (Dkt. # 75).

II. FACTS

In this case, as in Gordon, the Plaintiffs allege violations of the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM") and the Washington Commercial Electronic Mail Act (RCW 19.190) ("CEMA"). In both cases, each Plaintiff claims to be an "interactive computer service" as defined in CAN-SPAM and CEMA. (*See* Gordon, First Amended Complaint (Dkt. # 15) ¶¶ 3.2, 3.3**;** *see also* Plaintiffs' Second Amended Complaint ("SAC") at ¶¶ 7-8.) Plaintiffs' claimed CAN-SPAM and CEMA damages depend on their alleged status as interactive computer services. (SAC at ¶¶ 18, 20.)

Also, in both cases Plaintiffs seek damages based upon the following theories:

> 13. Each of the E-mails misrepresents or obscures information in identifying the point of origin or the transmission path thereof, and contains header information that is materially false or materially misleading. The misrepresentations include without limitation: "From" lines that fail to accurately identify the sender, and/or any other individual or entity responsible for initiating the email, or operating as a point of origin; IP addresses and host name information that do not match, or are missing or false, in the "from" and "by" tokens in the Received header field.
>
> 14. On information and belief, Plaintiffs allege that some of the E-mails used false, or misleading information in registering the domains from which the subject E-mails were sent, and that numerous domains were used to send the E-mails for no other purpose but to avoid spam filters, evade detection, and otherwise obscure the true point of origin of the E-mails.

(Plaintiffs' Second Amended Complaint ("SAC") at ¶ 13-14.)

Plaintiffs brought essentially identical claims in Gordon. (*See* Gordon, First

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Amended Complaint (Dkt. # 15).) In that case, the defendants moved for summary judgment alleging, *inter alia*, (i) that Plaintiffs do not have standing because they are not, and never were, an interactive computer service (or Internet access service)[1] adversely affected by the subject emails; and (ii) that Plaintiffs' theories regarding an email "from" line cannot give rise to a violation under CAN-SPAM or CEMA. (*See* Gordon, Defendants' Motion for Summary Judgment (Dkt. # 98).)

Plaintiffs' novel theories asserted in Gordon are unsupported by case law, FTC rule or regulation, or express statutory language. (*See* Gordon, Defendants' Motion for Summary Judgment (Dkt. # 98) at 16-28.) In that case, Gordon and Omni allege violations of CAN-SPAM and CEMA from emails they allege defendants sent with an improper IP address and host name protocol, transfer token information and other email header information. (Id.) The basis of Plaintiffs' claims are technical in nature and involve the intricacies and inner workings of email transmission over the Internet.

III. ARGUMENT

A. Standard for Granting a Stay of Proceedings.

In the interest of judicial economy, the Court may exercise its inherent power to stay proceedings until the resolution of a related matter that would resolve a dispositive matter. *See* Leyva v. Certified Grocers of California, 593 F.2d 857, 863-64 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case."); *see also* Silvaco Data Systems, Inc. v. Technology Modeling Associates, Inc., 896 F. Supp. 973, 975 (N.D. Cal. 1995) ("in the interest of wise judicial administration, a federal court may stay its proceedings where a parallel state action is pending") (internal citation omitted).

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[1] CAN-SPAM's definition of "Internet access service" is nearly identical to CEMA's definition of "interactive computer service." At 47 U.S.C. § 231(e)(4), CAN-SPAM defines an Internet access service as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet ..." (emphasis added). CEMA's definition of "Internet service provider", at RCW 19.190.010(8), applies to a party "that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet ..."(emphasis added).

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"Collateral estoppel" or "offensive nonmutual issue preclusion" generally prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). The application of "offensive nonmutual issue preclusion" is appropriate if:

1. there was a full and fair opportunity to litigate the identical issue in the prior action, *see* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003);

2. the issue was actually litigated in the prior action, *see* Appling, 340 F.3d at 775;

3. the issue was decided in a final judgment, *see* Resolution Trust Corp., 186 F.3d at 1114; and

4. the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action, *see* id.

See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988).

B. A Stay Is Appropriate in This Case Because This Court Is Adjudicating Plaintiffs' Identical Claims in Gordon.

If there is a judgment that Gordon and Omni do not have standing as an Internet access service in Gordon, then issue preclusion will be dispositive as to Plaintiffs' federal CAN-SPAM claims in the instant lawsuit. Alternatively, if the Court rejects Gordon's and Omni's legal theories in Gordon, then those findings will apply to Plaintiffs' theories in the instant matter.

First, Plaintiffs are the same entities as the plaintiffs in Gordon and have had a full and fair opportunity to litigate the identical issue in the related action. Plaintiffs have had an opportunity to make a record in Gordon and, if applicable, may advance any facts or testimony at trial that supports their claim to be an Internet access service. Second, the matters of (i) whether Gordon or Omni have standing as an Internet access service that is adversely affected; and (ii) whether their novel theories give rise to a claim for statutory damages under CAN-SPAM or CEMA are before the Court in the Gordon case. Third,

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the matter is fully briefed and before the Court in Gordon on summary judgment. Trial is scheduled for June 18, 2007. Inviva merely requests a stay pending resolution of that case and a final judgment. Finally, Plaintiffs are the identical plaintiffs as in Gordon and, accordingly, the fourth prong of issue preclusion has been satisfied.

All four factors weigh heavily in favor of granting a stay in the above-captioned case. Gordon will have a dispositive effect on this case even if the decision applies only to Plaintiffs' CAN-SPAM claims. The Gordon court may dismiss Plaintiffs' CAN-SPAM claims if it determines that Plaintiffs do not provide an Internet access service. It would be an enormous waste of resources if Omni is allowed to re-litigate the same issue in this lawsuit. Furthermore, since Plaintiffs' CAN-SPAM and CEMA claims in this case arise from the same collection of emails (SAC at ¶ 20-22), it will be far more efficient for the parties and the court to address the federal and state claims simultaneously, after the potentially dispositive resolution of Gordon.

C. This Court Has Recently Granted a Stay in Two Similar Cases.

This Court has already stayed two other cases involving the same issues and the same Plaintiffs, thereby promoting judicial economy and avoiding the potential waste of hundreds of hours of attorney time and unnecessary pretrial motion practice. Defendants respectfully request the Court grant a stay in this lawsuit for the same reasons it granted them in the two previous cases. In SmartBargains, defendant SmartBargains.com, LP moved this court to stay that lawsuit pending resolution of Gordon. (SmartBargains, Case No. CV06-01129-JCC, W.D.Wash., Motion to Dismiss Plaintiffs' CAN-SPAM Claims or to Stay This Litigation (Coughenour, J.) (Dkt. # 13.)) In their response, Gordon and Omni did not oppose staying that litigation. (*See* Id., Opposition to Defendant's Motion to Dismiss Plaintiffs' CAN-SPAM Claims (Dkt. # 14)). Subsequently, this court ordered a stay in that case pending resolution of Gordon. (Id., Order (Coughenour, J.) (Dkt. # 17.))

Similarly, the Ascentive defendants moved to stay that case pending resolution of Gordon. (Ascentive, Case No. CV06-01284-TSZ, W.D.Wash., Motion to Dismiss and to Stay This Litigation (Zilly, J.) (Dkt. # 65)). Omni's only argument in response was that

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Ascentive should not be stayed pending resolution in Gordon because the issue of whether Omni has standing under CAN-SPAM as an Internet access service allegedly could not affect Omni's state law CEMA claims. (*See* Id., Opposition to Defendants' Motion to Dismiss and to Stay This Litigation (Dkt. # 69).) As the defendants' reply noted, Omni's sole argument was unavailing for at least three reasons:

> First, the Omni decision will have a dispositive effect on this case even if that decision applies only to Plaintiffs' CAN-SPAM claims...
>
> Second, CAN-SPAM's definition of "Internet access service" is nearly identical to CEMA's definition of "interactive computer service."... In light of the clear similarities between the statutes, Plaintiffs' argument that the Omni court's ruling on CAN-SPAM "cannot possibly impact Omni's state law CEMA claims" (Response at 4:17-18) lacks credibility.
>
> Third, Plaintiffs' ability to define themselves as Internet access service providers is only one of the relevant issues to be determined in the [Gordon] case...

(*See* Id., Defendants' Reply Re Motion to Dismiss and Stay (Dkt. # 70).) Subsequently, like the SmartBargains court, the Ascentive court ordered a stay in that case pending resolution of Gordon. (Id., Minute Order (Zilly, J.) (Dkt. # 75.))

In the event the Court declines to grant a stay in this case – which is substantially similar to the SmartBargains and Ascentive cases – then the parties will have no alternative but to commence discovery. Inviva will request substantially the same documents and issue the same requests for admission as propounded by the defendants' counsel in the Gordon lawsuit. Plaintiffs will likely provide the same answers and the same documents. In turn, the parties will take depositions and develop much of the same record as in the related action. These efforts will take many months and consume many thousands of dollars. However, all of that time and money could be for naught if the Gordon Court were to rule either that (i) Gordon or Omni are not Internet access services adversely affected by emails or (ii) Gordon's and Omni's novel theories lack merit. Such rulings would eliminate Plaintiffs' CAN-SPAM and CEMA claims in the instant lawsuit pursuant to the doctrine of offensive nonmutual issue preclusion.

This case is in its nascent stages and the parties have not yet devoted resources to

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conduct discovery and pretrial motion practice. Balancing the lack of actual damages to Plaintiffs against the unnecessary expenditure of resources, this Court should grant a stay until such time as it makes a final adjudication of whether Plaintiffs have standing and whether their email "from" line theories will prevail.

IV. CONCLUSION

The Court should stay this litigation pending resolution of collateral issues in Gordon. This Court will resolve many of the same issues in that case as in this case – including the threshold issue of whether Gordon and Omni have standing – and it would be a gross waste of judicial resources and the resources of the parties to litigate this case when the Court is already deciding the same issues in another matter.

DATED this 19th day of April, 2007.

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